LOW CHENG SOON

v.

TA SECURITIES SDN BHD

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
KC VOHRAH JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: W-02-230-1998]
11 NOVEMBER 2002

CIVIL PROCEDURE: *Appeal - Appeal to Court of Appeal - Memorandum and record of appeal - Documents put in evidence before High Court - Whether all must be included in record of appeal - Rules of the Court of Appeal 1994, r. 18(4)(c) - Whether mandatory - Rules of court, rationale for observing*

WORDS & PHRASES: *"shall" - Rules of the Court of Appeal, r. 18(4)(c) - Whether means mandatory - Whether "shall" generally means obligatory*

This was the defendant's appeal against the decision of the High Court allowing the plaintiff's claim and dismissing the defendant's counterclaim. Before the hearing of the appeal, the plaintiff raised the preliminary objection that the defendant had failed to comply with r. 18(4)(c) of the Rules of the Court of Appeal 1994 ('RCA'). The plaintiff contended that of the eighty-five exhibits produced at the hearing before the High Court, only six were included in the record of appeal. It was contended that exhibits based upon which the learned judge had found against the defendant were excluded. The defendant's short reply was that only two of the exhibits were relevant to his appeal and, moreover, pursuant to r. 102 of the RCA, non-compliance with the RCA or any rule of practice shall not render any proceedings void.

Held:
Per Alauddin Mohd Sheriff JCA

[1] Rule 18(4)(c) of the RCA is mandatory. It clearly states that "The appellant **shall** attach to such memorandum copies of the proceedings in the High Court, including, copies of **all** affidavits read and of **all** documents put in evidence in the High Court so far as they are material for the purposes of the appeal … ." The word "shall" in the

rule means 'obligatory'. Hence, the defendant ought to have included all the exhibits and documents produced before the High Court. Furthermore, it was not for the defendant or his counsel, but for the court, to decide which of the exhibits were material and relevant to the appeal and which were not. (pp 314 e-g, h 315 a & 316 c-e)

[2] Whilst strict and slavish adherence to forms and rules can sometimes hinder the administration of justice, these forms and rules should not be disregarded for no reason whatsoever, since they embody the experience of the courts over the years in the cause of speedy and efficient administration of justice. (p 315 b-d & g)

[Plaintiff's preliminary objection upheld; defendant's appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan defendan terhadap keputusan Mahkamah Tinggi yang membenarkan tuntutan plaintif dan menolak tuntutan balas defendan. Sebelum pembicaraan rayuan tersebut, plaintif telah membangkitkan bantahan awal bahawa defendan telah gagal untuk mematuhi k. 18(4)(c) Kaedah-Kaedah Mahkamah Rayuan ("KMR"). Plaintif menegaskan bahawa daripada lapan puluh lima ekshibit yang dikemukakan di pembicaraan di hadapan Mahkamah Tinggi hanya enam dimasukkan di dalam rekod rayuan. Adalah ditegaskan bahawa ekshibit-ekshibit berdasarkan yang mana hakim yang bijaksana telah putuskan menentang defendan telah dikecualikan. Jawapan defendan yang ringkas adalah bahawa hanya dua dari ekshibit-ekshibit tersebut adalah relevan kepada rayuan beliau dan, lagi pun, selaras dengan k. 102 KMR, ketidak-patuhan KMR tersebut atau sebarang amalan tidak akan menjadikan sebarang prosiding batal.

Diputuskan:
Oleh Alauddin Mohd Sheriff HMR

[1] Kaedah 18(4)(c) KMR adalah mandatori. Ianya dengan jelas menyatakan bahawa "The appellant shall attach to such memorandum copies of the proceedings in the High Court, including, copies of all affidavits read and of all documents put in evidence in the High Court so far as they are material for the purposes of the appeal … ." Perkataan "shall" di dalam kaedah itu bermaksud 'obligatory'. Oleh itu, defendan sepatutnya telah memasukkan kesemua ekshibit-ekshibit serta dokumen-dokumen yang dikemukakan di hadapan mahkamah. Lagipun, ianya bukan untuk defendan atau peguam beliau, tetapi untuk

mahkamah, memutuskan yang mana daripada ekshibit-ekshibit tersebut adalah material dan relevan kepada rayuan tersebut dan yang mana tidak.

[2] Sementara pematuhan yang tegas dan tetap kepada kaedah-kaedah boleh kadangkala menjejaskan pentadbiran keadilan, kaedah-kaedah ini tidak seharusnya tidak dihiraukan kerana apa-apa alasan sekalipun, oleh kerana ianya mencantumkan pengalaman mahkamah-mahkamah sepanjang tahun-tahun yang berlalu berkenaan pentadbiran keadilan yang cekap dan segara.

Bantahan awal plaintif dipertahankan; rayuan defendan ditolak.]

Case(s) referred to:
Chua Choong Yin v. Tan Boon Bak Trading Sdn Bhd & Anor [2002] 3 CLJ 357 ***(foll)***
Yu Oi Yong & Anor v. Ho Toong Peng & Ors [1977] 1 MLJ 120 ***(foll)***

Legislation referred to:
Rules of the Court of Appeal 1994, r. 18(4)(c), (6)

For the defendant/appellant - Joseph Clemons (Burhanudin Abdul Wahid & Alice Lee Sok Wah); M/s Lee Sok Wah & Co
For the plaintiff/respondent - YL Chong; M/s Tan Hock Chuan & Co

[Appeal from High Court, Kuala Lumpur; Writ of Summons No: D4-22-109-91]

Reported by Gan Peng Chiang

JUDGMENT

Alauddin Mohd Sheriff JCA:
This is an appeal against the decision of the High Court Kuala Lumpur, which had allowed the respondent's claim and dismissed the appellant's counterclaim with costs.

The respondent is a stockbroking firm and has been in this business since 1973. Previously the respondent was known as Othman & Ng Securities Sdn. Bhd.

The appellant is a client of the respondent. The appellant opened a trading account with the respondent sometime in 1990. The appellant's application to open the said trading account with the respondent was approved and given account no. 16648.

On 6 March 1990, the appellant signed a margin agreement with the respondent which has the effect of converting the appellant's retail account no. 16648 into a margin account bearing the same number.

The appellant traded in his account from 12 February 1990 to 6 March 1990 under his trading account no. 16648 and thereafter under his margin account. A licensed dealer's representative (PW6) was assigned to handle the appellant's account and she was assisted by PW5, an administrative assistant.

On 27 August 1990 the appellant signed another margin agreement with the respondent. This account is a nominee account identified as 'Othman & Ng Nominees Account 100' and can be utilised by the appellant when he signed an indemnity (exh. P11) in respect of the said account. It is also a margin trading account.

Apart from the second margin agreement, the appellant also signed an admission letter dated 27 August 1990 in which the appellant admitted that he owed the respondent a sum of RM1,466,282.09 and agreed to settle the said outstanding debts incurred under his margin trading account no. 16648 by utilizing any sale proceeds from his collateral shares and contra gains from his new margin account under 'Othman & Ng Nominees A/C 100'.

The respondent issued cheques to the appellant in respect of shares sold and contra gains under his nominee account and the proceeds thereof were utilized to set off the outstanding amount under the appellant's margin trading account no. 16648.

From the share transactions conducted by the respondent on the instructions of the appellant including force selling of the appellant's collateral shares pledged with the respondent, the net amount outstanding due to the respondent from the appellant is RM541,995.86.

The respondent therefore claims for a sum of RM541,995.86 and interest at the rate of 12% per annum over RM466,049.98 from 1 January 1991 until full settlement and costs against the appellant for outstanding contra losses, rollover fees and interests thereon arising from share transactions due upon the instructions of the appellant.

The appellant, on the other hand counterclaims for the following:

i) A declaration that the share transactions in his account is 'illegal and void';

ii) Refund of all shares deposited by him with the respondent under the margin trading agreement or its value at the date of deposit and the sum of RM370,000 together with interest thereon at the rate of 8% per annum from the date of deposit to the date of realization;

iii) Loss and damage suffered by the appellant; and

iv) Costs.

At the conclusion of the hearing the learned judge allowed the respondent's claim with costs. As for the appellant's counter-claim he found there were no merits and dismissed them with costs. Hence the present appeal before us.

Before the start of the appeal before us learned counsel for the respondent raised a preliminary objection based on the failure of the appellant to comply with r. 18(4)(c) of the Rules of the Court of Appeal 1994 ('the Rules').

Learned counsel for the respondent submitted that there were altogether eighty (80) exhibits produced at the hearing before the High Court. However only six (6) were included in the Appeal Record. Learned counsel referred us to p. 49 of bundle A of the Appeal Record. The learned judge had there referred to certain exhibits ie, D21 to D25 (share deposit forms), P27 (1) to P27 (38) (contract notes) and P28 (a) to (m) (payment vouchers) and drew a finding that PW6 was the dealer's representative who had conducted all the share transactions as stated in the said documents for the appellant.

Turning on to p. 51 of the same bundle the learned judge made reference to exh. 37 (endorsements on the appellant's passport) and made the following finding:

> I hold that Exh. 37 is inadmissible for being hearsay evidence. That being the case the Defendant had failed to prove that he was in Hongkong from 18 February 1990 to 21 February 1990. The Defendant cannot claim that he was not around during those dates to conduct the share transactions.

Again at p. 54 of bundle A the learned judge referred to exhs. P10 and P11 and had this to say:

> The Defendant's evidence in court had clearly contradicted Exh. P10 and P11 which he himself had admitted signing.

Learned counsel for the respondent candidly admitted that when he received the draft index of the documents from the appellant he was unaware that these exhibits were not included. However, upon realizing this fact he immediately gave notice of his objection to the appellant. Unfortunately, there was no reply from the appellant.

Before us, in response to learned counsel for the respondent learned counsel for the appellant took a simplistic approach to the objection by informing us thatin this appeal they were concerned with only two exhibits ie, P1 (application to operate a trading account with the respondent) and P2 (the margin agreement) and these exhibits were included in the Appeal Record. Learned counsel then referred us to r. 102 of the Rules which deals with the effect of non-compliance ie, not to render any proceedings void.

We have carefully perused the Record of Appeal and we found at bundle C only six (6) exhibits were attached whereas p. 268 of bundle B revealed that there were altogether 85 exhibits produced before the High Court.

It must be observed that the language used in r. 18(4)(c) is as follows:

> (4) The appellant **shall** attach to such memorandum copies of the proceedings in the High Court, including
>
> (a) ...
>
> (b) ...
>
> (c) copies of **all affidavits** read and of **all** documents put in evidence in the High Court so far as they are material for the purposes of the appeal ... (emphasis added)

There is no doubt in our minds and we agree with learned counsel for the respondent that this rule is mandatory. There are abundant authorities decided in our courts to suggest that the word 'shall' when used in any legislation means 'obligatory'. However we do not propose to cite these authorities. Suffice it for us to say that the word 'shall' used in r. 18(4)(c) of the Rule reflects a measure of mandatoriness in it. As this is a mandatory rule it must therefore be strictly adhered to.

The said rule also speaks of 'all documents put in evidence'. This must mean that in the context of this appeal the appellant must include all the exhibit produced before the High Court. It cannot be overemphasized that these exhibits are essential in the determination of the appeal. As the case is concerned with transactions of shares in the stock market which often involve technicalities we feel that we will be placed in a difficult situation to decide the matter without the aid of all the exhibits.

Next, the said rule says 'so far as they are material for the purposes of the appeal'. Now, who is to decide which exhibits are material for the purpose of this appeal? We must say with the greatest of respect to learned

counsel for the appellant that it is not a matter for him to decide or say that only two exhibits are material. It is for the court to decide which exhibits are material and relevant to this appeal.

In our judgment, the importance of the Rules of Court cannot be ignored as otherwise the courts will be faced with endless problems involving the administration of justice. Speaking of the importance of the Rules of Court, the learned judge, Chang Min Tat J (as he then was) in *Yu Oi Yong & Anor v. Ho Toong Peng & Ors* [1977] 1 MLJ 120 had this to say (at p. 121):

> There should, in my view, be some adherence to the rules of court, unless required by circumstances, if there is to be any meaning or purpose in such rules.
>
> It should, I think, be realised by practitioners as well as by judges that while strict and slavish adherence to forms and rules can sometimes hinder the administration of justice, these forms and rules should not be disregarded for no reason whatsoever, since they embody the experience of the courts over the years in the cause of speedy and efficient administration of justice.

In *Chua Choong Yin v. Tan Boon Bak Trading Sdn. Bhd & Anor* [2002] 3 CLJ 357 the Court of Appeal was faced with similar issues. There the respondent raised two preliminary issues namely non-compliance by the appellant with:

(i) Practice Direction No. 3 of 1992; and

(ii) Rules 18(4)(c) and (6) of the Rules of the Court of Appeal 1994 ('the Rules').

Speaking through Siti Norma Yaacob JCA (as she then was) this is what the court said with respect to the first issue (at p. 363):

> Whilst we appreciate that practice directions do not have the force of law, they are created for a specific purpose, namely to regulate a systematic and consistent procedure governing the filing of appeal records. For that reason they have to be adhered to otherwise chaos and uncertainty in the filing of appeal records shall prevail. See the cases of *Yeo Yoo Teik v. Jemaah Pengadilan Sewa, Pulau Pinang & Anor* [1996] 2 CLJ 628 and *Ling Siok Seng v. Ting Sieh Chung* [1998] 4 CLJ 169.

In dealing with the second issue the court there found that the appellant was in clear breach of r. 18(4)(c) of the Rules when he included in his appeal records two prohibited (under court order) exhibits. The solicitors for the first respondent, by letter, pointed out to the appellant that the

inclusion of the said exhibits in his index of documents was in defiance of the court order but despite being put on notice, the appellant insisted on including the offending two exhibits and the fact of the first respondent's objection does not appear in the appeal records as required under r. 18(6) of the Rules.

The court there found that the appellant's refusal to acknowledge the objection was a clear breach of r. 18(6) of the Rules for which no explanation was forthcoming from him.

The court there upheld both preliminary objections and dismissed the appeal with costs.

Coming back to the instant appeal before us and for the reasons we have already mentioned earlier we would uphold the preliminary objection. We do so not because there is mere non-compliance with the Rules but rather because of the consequence which resulted from such non-compliance ie, a huge chunk of exhibits have been left out of the Appeal Record. Despite being informed by learned counsel for the respondent of his objection the appellant showed no response, an attitude which in our opinion amounted to a blatant disregard for the Rules. There was also no attempt made by the appellant to apply for leave to file a Supplementary Appeal Record. Such application, if made would have easily met our approval. Unfortunately nothing was done. We would therefore conclude that this appeal is not properly brought before us and on that finding we dismiss it with costs and order that the deposit be paid to the respondent to account of its taxed costs.

My learned brother Abdul Hamid b. Hj. Mohamed JCA has seen the judgment and agreed with it.

My learned brother KC Vohrah JCA has since retired.